INDEX

	Page
Counterstatement of the Case	1
Argument	3-7
Question No. 1	3
Question No. 2	5
Question No. 3	6
Conclusion	8

CITATIONS

Cases	Page
City of Morgantown, W. Va. v. Royal Ins. Co., 337 U.S. 254, 258 (1949)	6
Connecticut General Life Insur. Co. v. Breslin, 332 F. 2d 928 (5th Cir., 1964)	4
Kearney v. Case, 12 Wall 275 (1870)	5
Moore v. United States, 196 F. 2d 906, 908 (5th Cir., 1952)	4
Reeves v. Penn. R. Co., 9 F.R.D. 487 (D. Del., 1949)	5
Roth v. Hyer, 142 F. 2d 227 (5th Cir., 1944)	3
Switzer Bros. Inc. v. Locklin, 297 F. 2d 39, 45 (7th Cir., 1961)	6
United States v. Moore, 340 U.S. 616 (1951)	3, 5, 6
Wilson v. Corning Glass Works, 195 F. 2d 825 (9th Cir., 1952)	3

Federal Rules:

Federal Rules of Civil Procedure:

Rule 38	3, 5, 6
Rule 38(b)	3, 4
Rule 38(d)	4, 5
Rule 39(b)	5

Miscellaneous:

Moore's Federal Practice, Sect. 38.41, page 327	4, 6
Moore's Federal Practice, Sect. 38.05[5]	5
Moore's Federal Practice, Sect. 38.43, p. 326	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 573

ST. ELMO HAWKINS,
Petitioner,
vs.

GENERAL MOTORS CORPORATION, GEORGE R. JONES, t/a BEALE AND JONES, and CHRYSLER MOTORS CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT CHRYSLER MOTORS CORPORATION IN OPPOSITION

Counterstatement of the Case

Petitioner Hawkins sued Respondents General Motors Corporation, the law firm of Beale & Jones and Chrysler Motors Corporation in the District Court for stealing Petitioner's alleged invention, which he had taken to the law

firm of Beale & Jones in 1956 for evaluation of its patentability. Beale & Jones' opinion was that the invention was not patentable.

In 1960 Petitioner discovered a U. S. patent which issued to General Motors on an engine manifold which he thought looked like the manifold design he had taken to Beale & Jones. He also learned that the General Motors patent staff had occupied office space next to the Beale & Jones' offices in 1956. Based on this happenstance casual connection of next door office space, Petitioner attempted to prove in the District Court that General Motors had stolen his invention and that Beale & Jones was negligent in not filing a patent application on Petitioner's invention.

Regarding Chrysler, the Petitioner noticed in 1965, manifolds on Chrysler cars which he thought looked like his manifold design. Later, he learned that Chrysler had obtained a patent on its manifold. From this he deduced that Chrysler was in collusion with General Motors and that his invention had in some manner been traded off or passed on to Chrysler. Thus he also asserted during District Court proceedings that General Motors and Chrysler had engaged in conspiracy in violation of antitrust laws.

Petitioner did not call an expert during the trial in the District Court who could have explained whether the General Motors or Chrysler patents actually covered Petitioner's alleged invention, instead he offered testimony on this point from a draftsman who had prepared his original patent drawings at Beale & Jones and who admittedly had not even studied the claims of the patents.

The District Court, by oral and written findings of fact, found that Petitioner "totally failed" to support his charge that Chrysler or General Motors stole or in any way illegally acquired his alleged invention and, that he had produced

no evidence whatsoever that his alleged invention was transmitted to General Motors or Chrysler by word of mouth or otherwise. The District Court dismissed Petitioner's action after he had rested his case for failure to establish any *prima facie* case. (Petition, App. A and B.)

Argument

No question of law or justice denied presents itself in this case which is worthy of review by this Court. Nothing is presented in the way of variance between circuits or importance in constitutional law. It is just a standard ordinary case where the District Court dismissed the action because of total lack of evidence to support the charges.

Affirmance by a short *per curiam* decision was the ruling of the Court of Appeals for the Fourth Circuit, with a statement that the trial judge had afforded Petitioner "every opportunity to prove his allegations" but that he was unable to do so. (Petition, p. 20a.)

Question No. 1.

Denial of right to jury trial is the first matter asserted by Petitioner as requiring review. It is settled law that any right to jury trial is waived where no demand for same has been made as required by Rule 38, Federal Rules of Civil Procedure. *United States v. Moore*, 340 U.S. 616 (1951). *Wilson v. Corning Glass Works*, 195 F. 2d 825 (9th Cir., 1952). *Roth v. Hyer*, 142 F. 2d 227 (5th Cir., 1944); cert. denied 323 U.S. 712.

Petitioner started his action against Respondents in August, 1957 and on numerous occasions thereafter he had opportunity to demand a jury trial, however, by not timely doing so pursuant to Rule 38(b) any right to jury trial was waived.

On January 24, 1969, approximately 1½ years after bringing suit, and less than a month before the trial began, Petitioner moved to amend his already amended pleadings and at the same time requested a jury trial. The District Court permitted certain of the amendments, but denied the request for jury trial as coming too late under Rule 38(b) and as being waived under Rule 38(d).

Chrysler submits that since there was no abuse of discretion by the District Court ". . . the right to a jury trial, when once waived, cannot be revived, by a belated amendment of pleadings touching the same general issues." *Moore v. United States*, 196 F. 2d 906, 908 (5th Cir., 1952). *Connecticut General Life Insur. Co. v. Breslin*, 332 F. 2d 928 (5th Cir., 1964).

Yet even if the three amendments to the pleadings which were permitted (Petition p. 4) by the District Court less than a month before trial began are considered as the "last pleading" intended in Rule 38(b) to initiate the 10 day response period for demanding a jury, still the prayed for relief sought in these pleadings was *in equity* and thus these pleadings would not constitute an "issue triable of right by a jury . . ." as Rule 38(b) requires. *Moore's Federal Practice*, Sect. 38.41, at page 327 states:

> To renew the right to demand a jury trial, the amendment must convert a "suit in equity" into an "action at law," or otherwise create new jury issues. This was well stated by Judge Rodney in *Reeves v. Pennsylvania R. Co.*:
>
> "The authorities are uniform that when a plaintiff has waived a jury trial and subsequently files an amendment to the complaint which does not change the nature of the case or introduce new issues, such amendment does not entitle the plaintiff to demand a jury trial as a matter of right

and over objection, pursuant to Rule 38(b)." *Reeves v. Penn. R. Co.*, 9 F.R.D. 487 (D Del. 1949).

At best this Court's review of whether the three pleading amendments formed sound basis for demanding a jury trial would be a moot exercise. While Petitioner submitted no actual evidence to show that General Motors stole his invention, and based his case against General Motors and Beale & Jones on the circumstance that they had adjoining offices, there was not even a scintilla of evidence to show that Chrysler illegally secured any information regarding manifolds or its patent from General Motors or Beale & Jones, or that Chrysler's patent even covered the same idea as Petitioner's alleged invention. The District Court even stated (Petition p. 8a) that due to lack of evidence any contrary jury verdict, had there been a jury, would have been set aside.

Lastly Petitioner could have, but did not, request a jury trial by motion under Rule 39(b) after the District Court had ruled the jury demand came too late under Rule 38.

Question No. 2.

Petitioner also asks review stating that Rule 38(d) concerning waiver by silence of trial by jury is unconstitutional and contrary to the Seventh Amendment.

This Court has long held that neither the Sixth nor the Seventh Amendments are jurisdictional in nature and hence that the right of jury trial may be waived. *Kearney v. Case*, 12 Wall 275 (1870); *United States v. Moore*, 340 U.S. 616 (1951); *Moore's Federal Practice*, Sect. 38.05[5].

Rule 38, subparagraphs (a)-(d) inclusive, is unchanged since 1937. In regard to waiver of jury *Moore's Federal Practice*, Sect. 38.43, page 336 states:

Provisions for waiver of jury in federal practice go back as far as 1865. And although the pre-Rules practice required an express waiver, while Rule 38 proceeds on the very different theory of an automatic waiver in the absence of a timely affirmative demand, the integrated provisions of Rules 38 and 39 deal with jury and court trials in an effective and reasonable manner. As the Court observed in *City of Morgantown, W. Va. v. Royal Ins. Co.* [337 U.S. 254, 258 (1949)] concerning the method of trial under the united practice:

> "with careful regard for the constitutional rights of the parties, this Court, pursuant to specific authorization by Congress, adopted the Rules of Civil Procedure, abolishing procedural distinctions between law and equity and establishing a single unified practice."

This Court has also dealt with waiver by silence or inaction in *United States v. Moore, supra* page 621 as follows:

> Respondents also contend that the trial of this proceeding as an action for equitable relief denied their constitutional right to a jury trial. No demand for a jury trial was made as required by Federal Rule of Civil Procedure 38 and, so far as this record shows, any right to a jury trial was waived.

Question No. 3.

Assertion is also made that review is necessary because of alleged failure of the District Court to make findings of fact concerning ownership of the "disputed patent" (Petition p. 9).

Presumably the "disputed patent" is Chrysler's U. S. Patent No. 3,109,416. This patent, on its face is assigned to Chrysler and Petitioner never attempted to prove other-

wise. Contrary to Petitioner's assertion the District Court made the following oral findings (Petition, App. A) at conclusion of trial and written supplemental findings and conclusions (App. B) after trial:

> Now, the only other evidence that the plaintiff has produced in this Court as to General Motors, there is no evidence, none whatsoever in my opinion, that any overt acts has been proven or any overt act can be inferred that any body in Beale's office gave or exposed anything to General Motors. Conversely, there is no evidence that General Motors agents, surreptitiously or otherwise acquired any information from these attorneys in reference to this idea. So on the transferring it, it would have to be dismissed for want of evidence, total lacking of evidence. (Petition p. 2a.)

> The plaintiff objects to many of General Motors' proposed supplemental findings [joined in by Chrysler] but proposed none of his own.

* * * * *

> The Court finds that plaintiff totally failed to support his charge that the defendants, General Motors Corporation and Chrysler Corporation, stole or in any manner illegally acquired the alleged invention he disclosed to his patent attorneys, defendants Beale and Jones. (Petition p. 16a.)

> He produced no evidence whatsoever that his idea was transmitted to General Motors or the Chrysler Corporation by word of mouth or otherwise.

* * * * *

> The plaintiff claims that his idea was incorporated in the Kolbe patent and in Chrysler Patent No. 3,109,416. However, he produced no expert testimony to support this contention. To the contrary, the evidence disclosed that he took the Kolbe patent to his patent attorneys, Beale and Jones, and that they advised him that "Kolbe's claim cannot be read on your disclosure." (Petition p. 17a.)

> Further, the plaintiff's evidence failed to disclose any licensing arrangement or any connection between General Motors and Chrysler relating to intake manifolds. (Petition p. 18a.)
>
> The plaintiff's case, upon motion of the respective defendants, was dismissed at the conclusion of his case solely because he failed to produce sufficient evidence to *prima facie* establish any of his claims. (Petition p. 19a.)

For Petitioner to ask more than the above in the way of findings of fact and conclusions is nothing more than academic at best, particularly when viewed from the standpoint that he offered no evidence whatsoever that he should own the patent rather than the owner Chrysler. *Switzer Bros. Inc. v. Locklin*, 297 F. 2d 39, 45 (7th Cir., 1961); cert. denied 369 U.S. 851.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

DON K. HARNESS
Attorney for Respondent,
Chrysler Motors Corporation

Of Counsel:
MICHAEL DINNIN, JR.
HARNESS, DICKEY & PIERCE
700 Fisher Building
Detroit, Michigan 48202